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UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

ORACLE AMERICA, INC.

Defendant.

Case No. 2017-OFC-00006

**OFCCP'S OPPOSITION TO ORACLE'S MOTION FOR A PROTECTIVE ORDER RE:
CONFIDENTIAL INFORMATION**

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I. INTRODUCTION

Oracle America Inc. (“Oracle”) has moved this Court to approve an elaborate protective order that directly conflicts with the Freedom of Information Act (“FOIA”) and the regulations that bind both this Court and the Office of Federal Contract Compliance Programs (“OFCCP”). Although Oracle bills its 13-page proposed Protective Order (“the Protective Order”) as standard and uncontroversial—and OFCCP’s objections as correspondingly “irrational”¹—the truth is just the opposite. The Protective Order would function as an end run around FOIA, create new material handling rules where the regulations already provide clear direction to both the OFCCP and this Court on how to properly safeguard confidential information, override the Department’s *Touhy* regulations, violate the Federal Records Disposal Act and OFCCP’s Memorandum of Understanding with the Equal Employment Opportunity Commission (“EEOC”), and most absurdly, prevent OFCCP from sharing information with itself or witnesses, all while allowing Oracle to retain extraordinary gatekeeping power over its materials.

Indeed, this Court’s and OFCCP’s regulations require Oracle to produce documents to OFCCP during compliance reviews and during discovery in enforcement proceedings such as this. *See* 41 C.F.R. §§ 60-1.12(c), 60-1.20(a), 60-1.43, 60-30.9-30.11. They also set forth how those documents will be maintained and under what conditions they can, may, or will not be released.² Both this Court and OFCCP lack the authority to augment or detract from these

¹ Defendant Oracle America, Inc.’s Motion for Protective Order Re: Confidential Information; Memorandum of Points and Authorities (“Br.”) at p. 1.

² Oracle’s refusal to produce discovery absent an extraordinary order is consistent with its behavior that is subject to other motion practice. During the review, substituting its judgment for that of OFCCP, Oracle simply refused OFCCP’s document requests that it did not want to produce and now claims that OFCCP cannot conduct discovery beyond the narrow temporal window of documents that Oracle selected. Similarly, simply because OFCCP did not conciliate in the

statutory and regulatory requirements which balance the public's right to document disclosure with competing private interests in withholding documents. Although there are certainly many circumstances where this Court can issue protective orders, there is no authority to issue an order where it would conflict with other laws.

Revealingly, Oracle does not point to a single case where a Judge ordered a protective order over OFCCP's objections. This is not surprising as the Administrative Review Board ("ARB") has repeatedly held that the protective orders and other confidentiality agreements may not override FOIA and "[e]ven if the record were sealed, the Department of Labor would be required to respond to any request to inspect and copy the record of this case pursuant to FOIA." *Maureen Thomas v. Pulte Homes Inc.*, ARB Case No. 2005-SOX-00009, 2005 WL 4889014, at *3 (Admin. Rev. Bd. Aug. 9, 2005).³ The character of the discovery requests at issue in this matter are largely consistent with the type of information routinely sought and obtained during compliance reviews without protective orders.

II. BACKGROUND

OFCCP filed this action based on widespread violations it identified during a routinely-scheduled compliance review of Oracle's Redwood Shores headquarters. OFCCP alleges, among other things, ongoing compensation discrimination against women, Asians, and African

precise manner Oracle wanted it to, Oracle now claims in a separate motion that OFCCP's substantial efforts at conciliation do not count. Here, Oracle insists this Court must issue an order conflicting with numerous regulations and laws simply because Oracle is not comfortable with the balance these laws have struck.

³ *Cf. Faust v. Chemical Leaman Tank Lines, Inc.*, ARB Case No. 98-078, 1998 WL 164588, at *2 (Admin. Rev. Bd. Mar. 31, 1998) ("We have held in a number of cases with respect to confidentiality provisions in settlement agreements that the Freedom of Information Act, 5 U.S.C. § 552 (1988) (FOIA) 'requires agencies to disclose requested documents unless they are exempt from disclosure....'").

Americans in three lines of business (including 80 job titles) at Oracle's headquarters, since at least 2013. Amended Complaint, at pp. 1, 3-4, at ¶¶ 7-9. It also alleges use (in the past and presently) of a recruiting and hiring process that discriminates against qualified White, Hispanic, and African American applicants in favor of Asian applicants, particularly Asian Indians, based on race in 69 job titles at its headquarters, since at least January 1, 2013. *Id.* at pp. 1, 4, at ¶ 10. OFCCP also alleges that during the compliance review, Oracle denied access to documents requested by OFCCP. *Id.* at pp. 5-6, ¶¶ 13-15.

After Oracle filed its Answer on February 8, 2017, the parties commenced discovery. Oracle's approach to document production and handling quickly resembled that which it employed during the compliance review. In response to OFCCP's February 10 and 21, 2017 requests for production of documents, which sought basic information about Oracle's policies, practices, and procedures pertaining to hiring and compensation, Oracle refused to produce any documents. Connell Decl., Exs. A, B, Responses and Objections to OFCCP's First and Second Sets of Requests for Production of Documents.⁴ It was in these responses, received on March 7 and 20, 2017, that Oracle raised for the first time that it would not produce documents in response to more than one-third of the requests unless a protective order was entered. In spite of raising this objection, Oracle did not move for a protective order until April 21, 2017.

Oracle again refused to comply with discovery in response to OFCCP's March 2, 2017 notice of deposition of the person(s) most knowledgeable to testify regarding Oracle's databases and computer systems ("30(b)(6) deposition"). As with its previous responses to requests for information, Oracle, in its March 9, 2017 objections to the deposition notice, asserted that it would only produce witnesses to the non-objectionable portions of certain

⁴ "Connell Decl." refers to the Declaration of Erin Connell in Support of Defendant Oracle America, Inc.'s Motion for Protective Order Re: Confidential Information.

topics “after entering into an appropriate stipulated protective order.” *See* Connell Decl., Ex. D, at pp. 5-8. OFCCP consistently stated it would not agree to a protective order and attempted to persuade Oracle that no protective order was required or justified.⁵ After OFCCP notified Oracle that it would bring a motion to compel, Oracle moved this court for issuance of the Protective Order.

The Protective Order contains some extraordinary provisions that conflict with the statutory and regulatory requirements in OFCCP cases. Some sections impose onerous burdens on OFCCP. It also would restrict OFCCP’s ability to cooperate with itself in related investigations or with other government agencies. It would even restrict OFCCP’s ability to obtain critical information from witnesses in this case. During the meet and confer process, OFCCP conveyed its position that a Protective Order is unnecessary, given the statutory scheme, and raised its concerns that the Protective Order “conflicts with FOIA and other Federal law,” and provided examples. Connell Decl., Ex. G, at pp. 2-3, 13-14. For example, sections 7.1 and 9 of Oracle’s Protective Order unlawfully contain broad guarantees of confidentiality and predetermine the application of FOIA exemptions.

Nevertheless, Oracle now seeks a Protective Order with the same objectionable provisions from this Court, which conflicts with FOIA, the Federal Records Disposal Act, the *Touhy* Regulations for responding to subpoenas, and the letter and spirit of the Regulations implementing Executive Order 11246.⁶

⁵ Connell Decl., Ex. G; Declaration of Laura C. Bremer in Opposition to Oracle’s Motion for a Protective Order, at ¶¶ 2-3.

⁶ In its motion, Oracle asserts that it would be willing to adjust provisions to make them lawful. *See* Br. at pp. 19-20, n. 13, 14. However, it is neither the responsibility nor the function of this Court to do Oracle’s work for them and attempt to thread the needle in avoiding conflicts with the thicket of laws and regulations already in place regulating the agency’s document handling.

III. ARGUMENT

Oracle waived its basis for withholding discovery based on a protective order by failing to bring a motion for a protective order prior to the date discovery was due. As such, Oracle's motion should be denied as untimely.

Should this Court address the merits of Oracle's motion, the Protective Order must be denied because it violates numerous federal laws and regulations. The Protective Order should be denied for the additional reason that it is not intended to place reasonable limitations on document holding, but rather to prevent further exposure to liability by gagging the Department. This is an instance where the wolf has come dressed as a wolf. Oracle makes no pretense that its Protective Order complies with FOIA or other federal regulations. Rather, Oracle argues that the Protective Order is necessary precisely because it is not comfortable with the regulatory regime in place, and the Protective Order itself expressly overrides the Department's FOIA regulations and a host of other laws. Moreover, the Protective Order attempts to seal off Oracle's liability by preventing OFCCP from sharing information *with itself* to the extent information is relevant to other compliance reviews, as well as preventing OFCCP from discussing any information with witnesses that Oracle deems confidential. As such, the Protective Order would upset the balance struck by Congress in enacting FOIA between "meeting the demand for open government while preserving workable confidentiality in governmental decisionmaking," at a time when Congress appreciated that "much of the information within Government files has been submitted by private entities." *See Chrysler Corp. v. Brown*, 441 U.S. 281, 292-93 (1979). The Protective Order is also at odds with the purpose of Executive Order 11246, which seeks to eliminate employment discrimination by companies that benefit from government contracts. *Id.* at 304.

The ARB and the Secretary's decisions make clear that this type of Protective Order is out-of-bounds and must be denied.

A. Oracle Waived its Rights to Require a Protective Order.

In a footnote, Oracle tries to dispose of the argument that it seeks this Protective Order in an untimely fashion. Br. at p. 5, n. 3. Oracle mischaracterizes the law. In the written discovery context, it is well settled that a moving party's motion for a protective order is considered "seasonable" and timely if it is filed prior to the discovery due date. *Ayers v. Cont'l Cas. Co.*, 240 F.R.D. 216, 221 (N.D. W.Va.2007) (citing *United States v. IBM Corp.*, 70 F.R.D. 700, 701 (S.D.N.Y. 1976)) (Motions for a protective order must be made before or on the date the discovery is due.); see also *Brittain v. Stroh Brewery Co.*, 136 F.R.D. 408, 413 (M.D.N.C. 1991) (same).

The obligation to timely move for a protective order applies equally to written discovery as to protective orders for oral depositions. *Brittain*, at 136 F.R.D. at 141. In the deposition context, courts have stated that a witness must appear at a deposition where, as here, a timely protective order has not been entered prior to a properly noticed deposition. See, e.g., *Anderson v. White*, 2015 WL 5092716, at *1 (D. Nev. 2015) (In the absence of the timely entry of a protective order pursuant to Fed.R.Civ.P. 26(c), a party must appear at a properly noticed deposition or risk sanctions.).

Oracle's discovery response deadlines passed on March 7 and 20, respectively, and the 30(b)(6) deposition was noticed for March 28, 2017. In light of this, Oracle's window to move for a protective order had passed long before it filed its motion on April 21, 2017, *Anderson*, 2015 WL 5092716, at *1, and it risks sanctions. See, e.g., *Izzo v. Wal-Mart Stores, Inc.*, 2016 WL 409694, at *7 (D. Nev. 2016) (stating that Rule 37(d)(1) permits a court to sanction a party if its Rule 30(b)(6) designee fails, "after being served with proper notice, to appear for that person's deposition").⁷ Oracle's Motion is untimely and should thereby be denied.

⁷ Oracle relies heavily on an out of circuit district court case, *Sheets v. Caliber Home Loans, Inc.*, 2015 WL 7756156 (N.D. W.Va. Dec. 1, 2015), to claim they have not waived their protective

B. Oracle's Proposed Protective Order Is Incompatible with Numerous Federal Laws Regulating OFCCP's Handling and Release of Documents.

1. The Protective Order Is Incompatible with FOIA.

A central theme of Oracle's brief is that the proposed Protective Order is necessary in this matter to protect its "confidential commercial information" (including the "way that Oracle organizes its workforce" and "hiring, promotion, and compensation practices") because FOIA and the Privacy Act do not "guarantee protection" in a manner that is sufficient to give Oracle "comfort." Br. 1, 11; Declaration of Victoria Thrasher. However, Oracle's lack of comfort with the safeguards FOIA provides for its confidential information are beside the point, as the purpose of FOIA is not to protect the interest of one entity but "'to reach a workable balance between the right of the public to know and the need of the Government' to protect certain information."

John Doe Agency v. John Doe Corp., 493 U.S. 146, 153 (1989).

a) The Department of Labor Has Implemented Specific Regulations Governing the Handling of Requests for Confidential Information under FOIA.

Since both OFCCP and the OALJ are agencies⁸ as defined by FOIA, 5 U.S.C. § 551, the

order. However, here, Oracle did not even mention its desire for a protective order until the time its discovery responses were due, unlike in *Sheets*, where the parties had previously agreed to reach protective order issues after production. *Id.* at *4. Moreover, since Oracle first raised the issue, OFCCP has consistently advised Oracle it will not agree to a protective order in this case. Yet, Oracle waited more than a month after its responses to the first set of discovery requests were due to bring a motion for a protective order.

⁸ Oracle fails to acknowledge that this Court is different from Article III courts in this regard. *See also Faust v. Chemical Leaman Tank Lines, Inc.*, Case Nos. 92-SWD-2 and 93-STA-15, 1998 WL 164588 (Admin. Review Bd. Mar. 31, 1998) (Federal courts are not subject to FOIA; as a result, they have developed separate procedures for the protection of confidential and privileged information); *Duffy v. United Commercial Bank*, 2007-SOX-00063, WL 2007 7135771 (ALJ Oct. 23, 2007) (stating that the OALJ is an agency and subject to FOIA); *see also* 5 U.S.C. § 551(1)(B) (stating, in relevant part, that "'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include— . . . (B) the courts of the United States").

handling of confidential materials disclosed to the Department in this matter is controlled by FOIA. As the Supreme Court has explained, FOIA was amended in 1966 “to implement ‘a general philosophy of full agency disclosure.’ The amendment required agencies to publish their rules of procedure in the Federal Register, 5 U.S.C. § 552(a)(1)(C), and to make available for public inspection and copying their opinions, statements of policy, interpretations, and staff manuals and instructions that are not published in the Federal Register, § 552(a)(2).” *U.S. Dep’t of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 754–55 (1989) (internal notations omitted). “In addition, § 552(a)(3) requires every agency ‘upon any request for records which ... reasonably describes such records’ to make such records ‘promptly available to any person.’” *Id.*

To meet its FOIA obligations, the U.S. Department of Labor has published detailed regulations governing the disclosure of documents at 29 C.F.R. Part 70. 29 C.F.R. §§ 70.26(a)-(j), *Confidential Commercial Information*, describes a detailed process wherein a party disclosing confidential commercial information exempt under Exemption 4 of FOIA will: (1) have a role in designating their materials as confidential, § 70.26(b), (2) receive notice when confidential commercial material is requested under FOIA, § 70.26(c), and (3) be able to object where it believes that material should be withheld under Exemption 4. § 70.26(e). The agency will then take these objections into account when making its eventual decision about disclosure, and will inform the party’s whose information is at issue if it determines that disclosure is warranted. § 70.26(f).

In addition to these general regulations, OFCCP has promulgated more specific regulations at 41 C.F.R. § 60-40 that “implement 5 U.S.C. 552, the Freedom of Information Act and supplement the policy and regulations of the Department of Labor, 29 CFR Part 70.” 41 C.F.R. § 60-40.1. These provisions state that information obtained pursuant to Executive Order 11246 shall be disclosed, as long as they further the public interest and do not impede any of the

functions of OFCCP, unless a FOIA exemption applies. § 60-40.2(a). The regulations specify certain kinds of documents that must be disclosed. § 60-40.2(b). However, they also provide a safeguard for confidential commercial information, financial data, trade secrets and personal privacy data, all of which is not subject to compulsory disclosure. § 60-40.3(a)-(b).

b) Neither OFCCP Nor This Court Can Override FOIA or the Department's Regulations Implementing FOIA.

The Protective Order is inconsistent with the Department's FOIA's regulations. Specifically, section 6⁹ invents an entirely new and cumbersome process that, in accordance with section 9¹⁰, expressly replaces and supplants the Department's already robust procedures under 29 C.F.R. § 70.26 with respect to determining whether FOIA Exemption 4 applies. Then, sections 7.1 and 7.2 restrict disclosure of this material, not based on the determination of a FOIA Exemption, but based on the wholly new and made up procedures contained in section 6. The

⁹ Section 6, "CHALLENGING CONFIDENTIALITY DESIGNATIONS," introduces additional hurdles to the agency's document handling process, and sets up an onerous process whereby OFCCP has the burden to disprove a confidentiality designations set forth by Oracle. *See* Protective Order, at pp. 5-6.

¹⁰ Section 9 of the Protective Order provides:

PROTECTED MATERIAL REQUESTED UNDER THE FREEDOM OF INFORMATION ACT

The Parties agree that the Protected Material is confidential commercial information under Exemption 4 of the Freedom of Information Act ("FOIA") (5 U.S.C. 552 (b)(4)) and is subject to withholding under FOIA. Further, the Parties agree that Protected Materials constitute trade secrets and should not be disclosed given that unauthorized disclosure of such information would violate the Trade Secrets Act of 2006 (18 U.S.C. 1905). Based on this Agreement, the notice and response requirements under 29 C.F.R. 70.26 (c) and (f) do not apply to any FOIA requests for Protected Material in this litigation. *See* 29 C.F.R. § 70.26(g). If OFCCP, OFCCP's Counsel, or the ALJ receive a request under FOIA, or the regulations at 29 C.F.R. § 70.19 et seq. or 41 C.F.R. § 60-40.1, that seeks Protected Material, OFCCP, OFCCP's Counsel or the ALJ shall provide a copy of the request to Oracle and promptly notify the requester, in writing, that some or all of the material covered by the request is subject to this Stipulated Protective Order.

purpose of all this is by Oracle's own admission to do an end run around FOIA, as Oracle is not sufficiently comfortable with the disclosure requirements of the law itself and the Department regulations implementing the law.¹¹

Oracle's requested order must be denied. Neither this Court nor OFCCP can agree to amend or alter the procedures and balancing implemented in the Department regulations.¹² This Court's own rules explicitly acknowledge this with respect to documents in the Court's custody, stating that "[n]otwithstanding the judge's order [to seal a confidential document], *all parts of the record remain subject to statutes and regulations pertaining to public access to agency records.*" 29 C.F.R. § 18.85(b)(2) (emphasis added).

Oracle seeks a broad guarantee of confidentiality that has routinely deemed impermissible under as Administrative Review Board and Secretary's decisions. *See, e.g., Koeck v. Gen. Elec. Consumer & Indus.*, ARB Case No. 08-068, 2008 WL 7835869, at *3 (Admin. Rev. Bd. Aug. 28, 2008) (providing that "no assurances of confidentiality can be given in advance of an FOIA request").¹³ Similarly, the ARB and the Secretary have routinely held that protective orders are inappropriate or ineffectual in restricting FOIA. *See Pulte Homes Inc.*, 2005 WL 4889014, at *3 (stating in an analogous context that materials produced in the case, even confidential

¹¹ Oracle's Protective Order also applies an especially broad definition of "confidential," and then imposes a reverse burden that requires the agency to disprove a confidentiality designation. *See* Protective Order, sections 2.2 and 6.

¹² "[A]n agency is bound by its own regulations, and an agency head acting in an adjudicatory capacity has no authority to review the validity of those regulations." *OFCCP v. Goya de Puerto Rico, Inc.*, ARB Case No. 99-104, 2002 WL 451304, at *5 (Admin. Rev. Bd. Mar. 21, 2002).

¹³ *See also Jordan v. Sprint Nextel Corp.*, ARB Case No. 06-105, 2008 WL 7835837, at *7 (Admin. Rev. Bd. June 19, 2008) (same); *Debose v. Carolina Power & Light Co.*, No. 92-ERA-14, 1994 WL 897419, at *3 (Sec'y, Feb. 7, 1994) (same).

information, were agency records and must be made available for public inspection and copying under the FOIA in spite of a protective order.).¹⁴

These decisions are consistent with the well-recognized principal that FOIA exemptions are “exclusive,” *Environmental Protection Agency v. Mink*, 410 U.S. 73, 79 (1973), because FOIA “does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in [the Act].” 5 U.S.C. § 552(d). As such, exemptions are to be narrowly construed, and agencies cannot expand the exemptions through broad regulations. *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). If documents do not fall within an exemption, agencies may not justify withholding on the grounds that disclosure “would do more harm than good,” *Wellman Indus., Inc. v. NLRB*, 490 F.2d 427, 429 (4th Cir. 1974), *cert. denied*, 419 U.S. 834 (1974), or that the disclosed documents could be misinterpreted, *Getman v. NLRB*, 450 F.2d 670, 680 (D.C. Cir. 1971).

In the OFCCP context, the Secretary has held that the Department’s regulations provide clear guidance for the treatment of confidential materials in Executive Order cases. In *OFCCP v. Prudential Ins. Company*, 80 OFCCP No. 19, 1980 WL 275523 (Sec’y, July 27, 1980), a government contractor sought to protect what it believed to be “highly confidential commercial and financial information the improper disclosure of which could cause substantial competitive

¹⁴ See also *Pulte Homes, Inc.*, 2005 WL 4889014 at *3 (“Even if the record were sealed [under a protective order], the Department of Labor would be required to respond to any request to inspect and copy the record of this case pursuant to FOIA. As the Board has noted: “If an exemption is applicable to the record in this case or any specific document in it, the Department of Labor would determine at the time a request is made whether to exercise its discretion to claim the exemption and withhold the document. If no exemption were applicable, the document would have to be disclosed.”) (citing *Seater v. Southern California Edison Co.*, 1995-ERA-13, at *3 (Admin. Rev. Bd. March 27, 1997); *Paine v. Saybolt, Inc.*, ARB Case No. 97-102, 1997 WL 414346, at *1 (Admin. Rev. Bd. July 22, 1997) (denying a protective order in the whistleblower context because “FOIA requires federal agencies to disclose requested records unless they are exempt from disclosure under that Act.”)

injury to Prudential and serious invasions of privacy of an estimated 15,000 Prudential employees.” *Id.* at *6. Affirming the ALJ’s finding, the Secretary concluded that the determination regarding confidentiality of materials requested pursuant to an agency’s regulations is the decision of the agency in the first instance. *Id.* at *6-7 (citing *F.T.C. v. Texaco, Inc.*, 555 F.2d 862 (D.C. Cir. 1977), *cert. denied*, 431 U.S. 974, petition for rehearing denied, 434 U.S. 883). The Secretary held that Prudential could not unilaterally withhold documents because it believed them to be confidential; and that the regulations provided adequate protection for Prudential’s confidential information. *Id.* at *7.

In sum, Oracle’s objective in proposing the Protective Order—supplanting and replacing the Department’s FOIA regulations to tip the scale away from disclosure—is simply something that OFCCP lacks authority to agree to and this Court lacks the authority to order.¹⁵

2. The Protective Order Impermissibly Attempts to Regulate How Information Is Shared.

In addition to upending the FOIA process, the Protective Order’s other main purpose is to ensure OFCCP cannot disclose information related to this case except in the narrowest of circumstances, in clear contravention of Departmental regulations.¹⁶

¹⁵ Oracle argues that a statement made to the press by Regional Solicitor Janet Herold in an OFCCP matter involving Google provides justification for the proposed Protective Order. Br. at 18. However, the statement in question would not be covered by this Protective Order because it involved commentary about testimony made at a public hearing and related to preliminary analyses. The content in no way involved the release of specific data or information. It appears Oracle seeks this protective order in the hopes that it can be shielded from bad press. However, this is not a basis for approving a protective order in public proceedings. *See* 41 C.F.R. § 60-30.4(a).

¹⁶ Section 7, entitled “ACCESS TO AND USE OF PROTECTED MATERIAL” states “Basic Principles” in section 7.1:

a) *The Protective Order Would Prevent OFCCP from Using Information in Other Reviews of Oracle.*

The Protective Order explicitly prohibits OFCCP from using material that Oracle designates as Confidential “in furtherance of, or in the context of, any open, pending or future OFCCP compliance evaluation, OFCCP conciliation process, claims or litigation other than the above captioned action.” Protective Order, Section 7.1.

The purpose of this provision is clear—as this is a review of Oracle’s headquarters and OFCCP may obtain data or information that is directly relevant to a number of other open reviews¹⁷—Oracle is seeking through the guise of this supposedly “noncontroversial” Protective Order to do something extraordinary: stop the Agency from talking to itself and sharing information critical for efficiently completing its mission and its other reviews.¹⁸ Oracle identifies no precedent for such an extraordinary gag order which has nothing to do with public

A Receiving Party may use Protected Material that is disclosed or produced by another Party or by a Non-Party in connection with this case only for prosecuting, defending, or attempting to settle this action. Consistent with the foregoing limitation, Protected Material may not be used by a Party or Counsel in furtherance of, or in the context of, any open, pending or future OFCCP compliance evaluation, OFCCP conciliation process, claims or litigation other than the above captioned action. Additionally, Protected Material may not be shared with any other governmental departments or agencies outside OFCCP. Furthermore, such Protected Material may be disclosed only to the categories of persons and under the conditions described in this Order. When the litigation has been terminated, a Receiving Party must comply with provisions of section 14 below (FINAL DISPOSITION). Protected Material must be stored and maintained by a Receiving Party at a location and in a secure manner that ensures that access is limited to the persons authorized under this Order.

¹⁷ “Since early 2013, OFCCP has selected Oracle for a compliance review more than 40 times.” Oracle’s Statement, Parties’ Joint Case Management Statement, p. 3, n.2.

¹⁸ OFCCP is in no way suggesting that it can, or would, issue discovery for the sole purpose of obtaining information related to other reviews. Discovery rules already prevent this. What the Protective Order does is far more reaching—preventing the Agency for sharing relevant information that it properly obtains through discovery relevant to this matter.

disclosure of the material they state is confidential. As an example of the absurdity and potential harm caused by this provision, under Oracle's proposed language, should an Oracle compensation official admit to discriminating in setting compensation against women nationwide, OFCCP would be entirely unable to share this clearly relevant information with itself in relation to other reviews. Oracle does not even attempt to argue good cause for this, and there is none—its only purpose is an attempt to limit Oracle's potential exposure to liability for unlawful acts.

b) The Protective Order Would Prohibit Sharing with Other Federal Agencies.

Oracle's Protective Order explicitly states, "Protected Material may not be shared with any other governmental departments or agencies outside OFCCP." Protective Order, section 7.1. This proposed gag order conflicts with binding Agency regulations. Specifically, 41 C.F.R. § 60-40.1 expressly provides: "It is the policy of the OFCCP to disclose information to the public and to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment." (Emphasis added). Similarly, 41 C.F.R. § 60-1.43, makes clear that "[i]nformation obtained in this manner shall be used only in connection with the administration of the Order, the Civil Rights Act of 1964 (as amended), and any other law that is or may be enforced in whole or in part by OFCCP." See also 41 C.F.R. § 60-1.7(c) (providing for sharing with EEOC). Thus, the regulations expressly contemplate that information obtained from the contractor during the review may be shared as necessary to enforce the aims of the Executive Order or Title VII.

Consistent with these provisions, OFCCP has entered a Memorandum of Understanding ("MOU") with the EEOC, which requires the agencies to cooperate with each other in information sharing. See Memorandum of Understanding Between the U.S. Department of Labor and Equal Employment Opportunity Commission, EEOC.GOV (Nov. 7, 2011) at section

1(b).¹⁹ The agreement also imposes specific disclosure rules and confidentiality requirements. *See id.* at sections 4 and 5. In light of these provisions, a circuit court has expressly held that the MOU’s sharing provision is consistent with the regulatory framework of both the EEOC and OFCCP, even with regard to the exchange of confidential information, and has denied contractors’ attempts to prevent this sharing. *Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898, 906 (8th Cir. 1979).

Because the Protective Order restricts OFCCP’s ability to cooperate with itself and with its government partners as expressly permitted by regulation and required under the MOU with the EEOC, the Protective Order must be denied.

c) The Protective Order Would Prevent OFCCP from Obtaining Information from Witnesses.

Hidden within the Protective Order is a brazen attempt by Oracle to exercise extraordinary control over OFCCP’s communications with witnesses. Section 7.2(h) of Oracle’s proposed Protective Order prevents any disclosure of information Oracle designates as “Confidential” to any “witness” (which would include Oracle’s employees and former employees) except in extremely limited situations: “during or in preparation for their depositions, witnesses in the action to whom disclosure is reasonably necessary and who have signed the ‘Acknowledgment and Agreement to Be Bound’ (Exhibit A), unless otherwise agreed by the Designating Party or ordered by the ALJ.” In other words, if an employee or former employee contacts OFCCP to provide information, it could not engage in any “conversations . . . that might reveal” information Oracle has designated as “Confidential” —which Oracle defines as virtually all of its internal policies, practices, strategy, processes, and procedures—with the

¹⁹ Available at https://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm.

employee who calls it. Protective Order at p. 3, section 3(3), and p. 7, section 7.2(h)..²⁰ This provision is unlawful and would severely prejudice OFCCP in the preparation and prosecution of this case.

Pursuant to the Protective Order, unless Oracle schedules an employee or applicant witness for deposition under the procedures in Oracle's Order, OFCCP essentially cannot have a meaningful conversation *with any* witness. This is in direct contravention with OFCCP's regulatory authority to interview the contractor's employees. *See* 41 C.F.R. § 60-1.20. It directly violates 41 C.F.R. § 60-1.32, which prevents interference and intimidation of any individual who assists or participates "in any manner in an investigation, compliance evaluation, hearing, or any other activity related to the administration of the Order."

Contractors violate 41 C.F.R. § 60-1.32 where they fail "to take all necessary steps to ensure that no person intimidates, threatens, coerces or discriminates against any individual for the purpose of interfering with, *inter alia*, furnishing information, or assisting or participating in any manner in an investigation or hearing.... [It] is not necessary to base that conclusion on a finding of actual coercion." *OFCCP v. Uniroyal, Inc.*, Case No. OFCCP 1977-1, 1979 WL 258004, at *20 (June 28, 1979). Indeed, a "failure to take all appropriate action to avoid possible coercion or intimidation constitutes a violation of 41 CFR 60-1.32, regardless of whether [the contractor] successfully coerced or intimidated any employees." *Id.*

The Supreme Court has interpreted interference and retaliation laws similar to 41 C.F.R. § 60-1.32 broadly in the federal employment law context, recognizing that for effective enforcement, the Secretary of Labor necessarily relies upon "information and complaints received from employees seeking to vindicate rights claimed to have been denied." *Kasten v.*

²⁰ Thus, per Oracle, if the Protective Order is entered, OFCCP could not ask a former employee questions about Oracle's hiring or compensation policies that it produces to determine if its policies differed from its practices. Nor can OFCCP ask witnesses to confirm information it obtains through discovery.

St.-Gobain Performance Plastics Corp., 531 U.S. 1, 11-12 (2011). Title VII also depends upon the cooperation of employees who are willing to file complaints and act as witnesses. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006)(citations omitted) (“Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act’s primary objective depends.”). In the employment discrimination context, numerous cases recognize that presenting anecdotal evidence of employees and other witnesses can bring “the cold [statistical] numbers to life.” See, e.g., *Hazelwood School District v. United States*, 433 U.S. 299, 339 (1977). Moreover, interviewing “employees potentially impacted by discriminatory compensation” is “an invaluable way for [OFCCP] to determine whether compensation discrimination in violation of Executive Order 11246 has occurred and to support its statistical findings.” See 79 FR 55712-02, 2014 WL 4593912 (F.R.), Proposed Rules, 41 C.F.R. Part 60-1, RIN 1250-AA06.

With respect to the few employees or applicants that are scheduled for deposition, the Protective Order further ensures that they will be scared off by requiring them to sign an ominous document named: “Acknowledgment and Agreement to Be Bound,” which requires them to state their name, make a declaration under penalty of perjury, and state their understanding that “failure to comply” with the Protective Order “could expose me to sanctions and punishment in the nature of contempt.” The form also requires notarization. Protective Order at p. 14.

This requirement is so off-kilter that if Oracle required employees to sign this document, it would be considered an adverse employment action, which the Supreme Court broadly defines in the retaliation context to mean any action that “might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’” *Burlington N. & Santa Fe Ry.*, 548 U.S. at 68. The “Acknowledgement and Agreement to Be Bound” not only interposes obstacles to

employees signing, such as the notarization requirement, but the strong language and requirement that they identify themselves would also chill participation in this proceeding. This result would be contrary to both the letter and the spirit of Executive Order 11246 and its implementing regulations.

d) The Protective Order Conflicts with Regulations for Responding to Subpoenas.

It is further noted that section 8 of the proposed Protective Order also creates a wholly new process with respect to how subpoenaed documents are to be handled by the Department. However, the Department already has detailed regulations setting forth strict requirements on how such subpoenas are to be handled. 29 C.F.R. §§ 2.20-2.25 (“*Touhy* Regulations”). Again, neither OFCCP nor this Court have the authority to amend or create new requirements with respect to the processing of subpoenaed information.

3. The Protective Order Violates the Federal Records Disposal Act.

Oracle’s utter lack of understanding or respect for the laws regulating agency document handling is further demonstrated by its inclusion of another plainly illegal provision with respect to the document disposal. *See* Federal Records Disposal Act, 44 U.S.C. §§ 3301, *et seq.* (“FRDA”). Section 14 requires that all documents be returned or destroyed within 60 days of final adjudication.²¹ *See also* Br. at 19. However, disposal of records must be in accordance with the FRDA, which prohibits the return or destruction of records at the end of this litigation. *See EEOC v. Kronos Inc.*, 694 F.3d 351, 359 (3d Cir. 2012) (“Courts must exercise caution when issuing confidentiality orders so as not to demand that the EEOC destroy government documents,

²¹ Section 14 of the Protective Order provides: “FINAL DISPOSITION
Within 60 days after the final disposition of this action, as defined in paragraph 4, each Receiving Party must return all Protected Material to the Producing Part or destroy such material.” Protective Order, at p. 12.

including notes and memoranda, in conflict with the EEOC's duty to obey the requirements of the FRDA.”).

4. The Protective Order Is Not Necessary to Protect Personal Identifiable Information.

Oracle attempts to win sympathy for its Protective Order by claiming that it is needed in part to protect the personal information of its employees.²² However, OFCCP routinely obtains such information in compliance reviews without any insulating protective order. Indeed, OFCCP obtains exactly this type of information in all reviews.²³

A number of regulations and policies already protect against the disclosure of personal identifiable information. For example, the Privacy Act, 5 U.S.C. § 552 *et seq.*, prohibits the disclosure of a record about an individual from a system of records absent the written consent of the individual, unless the disclosure is pursuant to one of twelve statutory exceptions. In addition, this Court's rules require redactions of information like social security numbers and other personal identifiers in filings. *See* 29 C.F.R. § 18.31. Moreover, the Department of Labor has a policy that, similarly, protects personal identifying information. *See* Department of Labor Guidance on the Protection of Personal Identifiable Information, <https://www.dol.gov/general/ppii>.

²² Oracle suggests, without any supporting legal argument or explanation (much less citation to authority), that a protective order is necessary to ensure compliance with a California state constitutional provision. This unsupported suggestion, entirely lacking in analysis or context, is characteristic of Oracle's attempt to throw everything at the wall and see if anything sticks. Oracle entirely fails to show how its protective order is mandated by the state of California and, if so, how the State of California's laws have supremacy over the detailed federal rules described herein.

²³ Oracle also raises the prospect of “cyber attacks” as supporting the need for the Protective Order. However, nothing in the Protective Order prevents cyber attacks. Nor has Oracle pointed to any authority suggesting that the potential for illegal cyber attacks warrants conditioning disclosure of documents provided to the government.

The Protective Order proposed by Oracle is not geared toward and not necessary to protect employees. Indeed, refusing to supply OFCCP, an agency whose mission is to protect employees, with employment-related information on employees absent a protective order is like refusing to provide social security numbers to the Social Security Administration or tax information to the Internal Revenue Service.

C. Protective Orders Such as that Proposed by Oracle Are Not Routine in OFCCP Proceedings.

1. This Court's Rules Do Not Specifically Provide for a Protective Order in this Context.

Oracle argues that a protective order is appropriate here because this Court's rules allow for protective orders. *See Br.*, at pp. 3-4. As a point of fact, the specific rules that apply to OFCCP proceedings such as this do not have a provision that specifically authorizes motions for protective orders. *See* 41 C.F.R. Part 60-30. The only relevant rule in Part 60-30 pertains to sealing court records, and narrowly provides that a filing with the court may be sealed where there is a showing of "good cause" "regarding *specific papers* and pleadings in a *specific case*." 41 C.F.R. Part 60-30.4. (Emphasis added).

While this Court does have specific rules as to the application for a protective order under its general 29 C.F.R. Part 18 rules, it is important to note that these general rules apply to a variety of proceedings, many of which do not involve the Department or OFCCP, such as Longshore and many whistleblower proceedings. The fact that a procedure exists for obtaining protective orders in such cases does not support entry of a protective order here. It certainly does not support an order that supplants the Department's FOIA's regulations, conflicts with regulations governing information sharing, violates a record retention law, and generally serves no legitimate purpose other than to limit the ability of the government to redress violations.

2. Other Protective Orders Entered in Other Circumstances Are Irrelevant to Determining Whether this Protective Order Is Justified.

In an effort to paint OFCCP as unreasonable, Oracle points to any protective order it can find that the Department has entered into in an effort to win on the grounds of “past practice.” Br. at pp. 4-5. Because the Labor Department’s program areas are governed by different statutory and regulatory regimes, they cannot necessarily be analogized, and even within a program area, the specific language of the Protective Order or the context of the proceedings is necessary to evaluate it. For example, *Perez v. Kazu Construction*, No. 16-00077 ACK-KSC, 2017 WL 628455 (D. Haw. Feb. 15, 2017), involved a protective order that a federal district court judge (not bound like this Court to ARB decisions and binding Agency regulations) ordered the parties to enter it.

In addition, some of the protective orders are distinguishable on the grounds that the information the order sought to protect reflected the internal workings of the government. For example, in *Perez v Guardian. Roofing, LLC*, No. 3:15-cv-05623-RJB (W.D. Wash. May 24, 2016, ECF No. 56), the Department’s Wage and Hour division sought to protect *internal government materials* contained in the division’s Field Operations Handbook. See Connell Decl. ¶ 9, Ex. H (*Perez*, No. 3-15-cv-05623-RJB, at p. 1). Similarly, in *Copeland v. Marshall*, 641 F.2d 880, 885-86 (D.C. Cir. 1980), the Department sought to protect non-public information from being released in a gender discrimination class action suit brought against the federal government. Such protective orders are routine in federal labor relations cases and the purpose is to ensure that all documents released in proceedings with a non-government entity are treated in accordance with FOIA and the numerous laws that govern federal documents. By contrast, the purpose of Oracle’s Protective Order is to grant Oracle, a public corporation, gatekeeping power over documents and information regarding its employment practices in an action brought by the federal government in contravention of government document handling laws.

IV. CONCLUSION

For the reasons stated above, OFCCP respectfully requests that this Court deny Oracle's motion for a protective order. Oracle waived its rights to request a protective order by waiting until discovery was due to first raise the issue. Moreover, the proposed Protective Order directly conflicts with numerous applicable laws and regulations, interferes with the Agency's internal operations, and is not supported by good cause.

Respectfully submitted,

DATED: May 5, 2017

NICHOLAS C. GEALE
Acting Solicitor of Labor

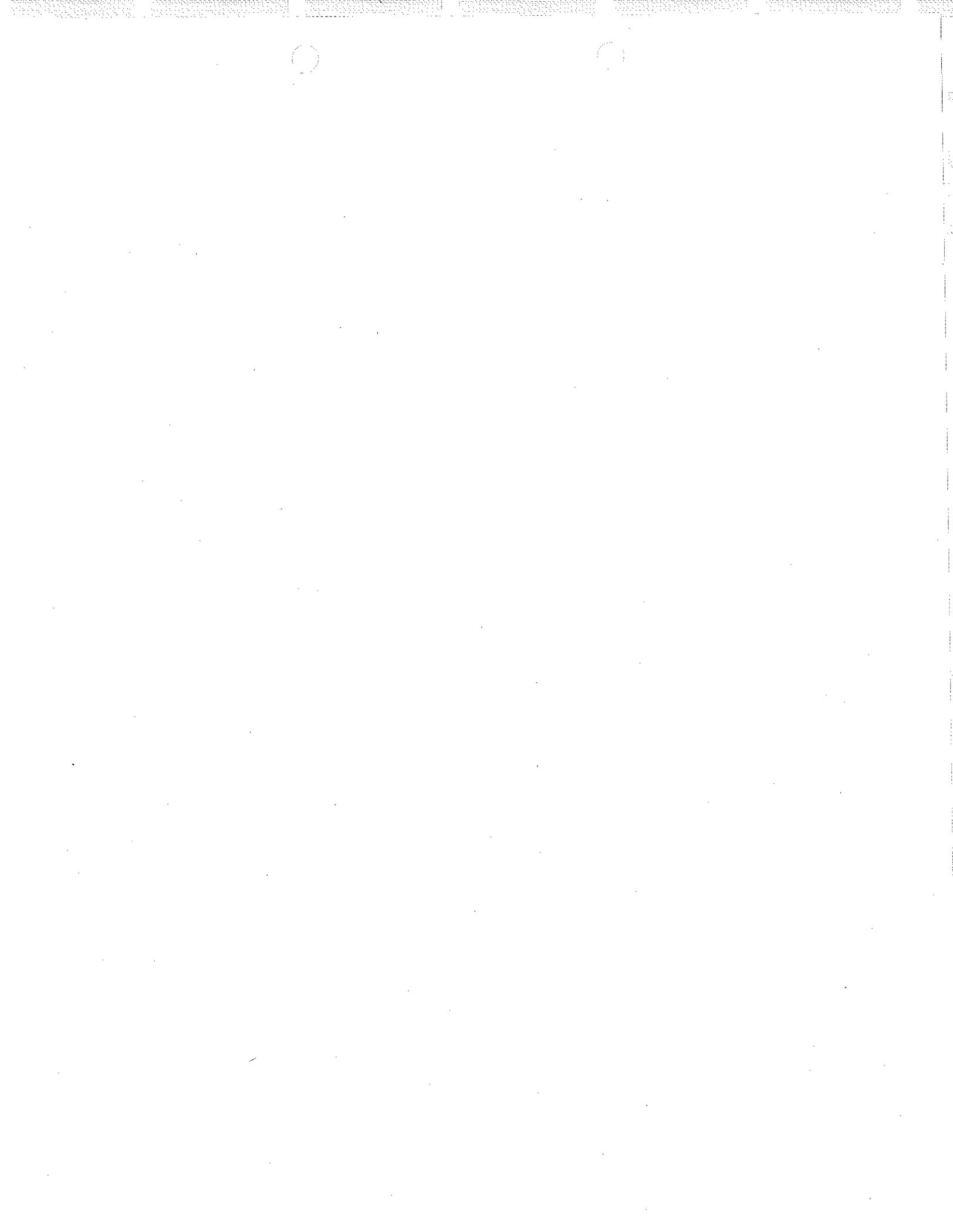
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 MAY 05 2017

**UNITED STATES DEPARTMENT OF LABOR
 OFFICE OF ADMINISTRATIVE LAW JUDGES**

**OFFICE OF FEDERAL CONTRACT
 COMPLIANCE PROGRAMS, UNITED
 STATES DEPARTMENT OF LABOR,**

Plaintiff,

v.

ORACLE AMERICA, INC.

Defendant.

Case No. 2017-OFC-00006

**DECLARATION OF LAURA C. BREMER IN SUPPORT OF OFCCP'S OPPOSITION
 TO ORACLE'S MOTION FOR A PROTECTIVE ORDER RE: CONFIDENTIAL
 INFORMATION**

I, Laura Bremer, state and declare as follows.

1. I am a Senior Trial Attorney for the U.S. Department of Labor, Office of the Solicitor, and counsel of record for Plaintiff in this action. I submit this declaration in support of OFCCP's Opposition to Oracle's Motion for a Protective Order Re: Confidential Information. I have personal knowledge of the matters set forth in this declaration, and I could and would competently testify thereto if called upon to do so.

2. Attached as Exhibit 1 is a true and correct copy of meet and confer correspondence pertaining to the parties' March 15, 2017 discussion about Oracle's proposed protective order.

3. On March 15, 2017, I participated in a meet and confer telephone call with Oracle's attorneys Erin Connell, JR Ridell, and Logan Herlinger. Forty minutes before the scheduled meet and confer, Erin Connell sent me a 13-page proposed protective order. During the meet and confer, I stated OFCCP's position that we do not agree to protective orders. However, I indicated that I had not yet had a chance to review the proposed protective order, since I had just received it, and would review it and get back to them regarding the protective order.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 5, 2017 in San Francisco, California.



LAURA C. BREMER

Bremer, Laura - SOL

From: Pilotin, Marc A - SOL
Sent: Monday, March 13, 2017 7:57 AM
To: Connell, Erin M.
Cc: Eliasoph, Ian - SOL; Miller, Jeremiah - SOL; Siniscalco, Gary R.; Kaddah, Jacqueline D.; Robinson, Kimberly - SOL; Bremer, Laura - SOL
Subject: RE: OFCCP v Oracle

Erin,

Wednesday at 2:30 p.m. works for us. We can use our dial-in number: 866-510-5314, code 4258991.

Thanks,

Marc

Marc A. Pilotin
Trial Attorney
U.S. Department of Labor, Office of the Solicitor, Region IX – San Francisco
90 Seventh Street, Suite 3-700
San Francisco, CA 94103
tel: (415) 625-7769 | fax: (415) 625-7772
pilotin.marc.a@dol.gov

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From: Connell, Erin M. [mailto:econnell@orrick.com]
Sent: Friday, March 10, 2017 4:50 PM
To: Pilotin, Marc A - SOL
Cc: Eliasoph, Ian - SOL; Miller, Jeremiah - SOL; Siniscalco, Gary R.; Kaddah, Jacqueline D.; Robinson, Kimberly - SOL; Bremer, Laura - SOL
Subject: Re: OFCCP v Oracle

Hi Marc,

We are available at 2pm or later on Wednesday.

Thanks,

Erin

Sent from my iPhone

On Mar 10, 2017, at 4:24 PM, Pilotin, Marc A - SOL <Pilotin.Marc.A@DOL.GOV> wrote:

Erin,

In addition to meeting and conferring next Wednesday about a stipulation regarding the form of the parties' productions, we would also like to meet and confer about the 30(b)(6) deposition notice Laura served, including regarding scheduling and Oracle's objections. Please advise as to a time next Wednesday when you are available.

Thanks,

Marc

Marc A. Pilotin
Trial Attorney
U.S. Department of Labor, Office of the Solicitor, Region IX – San Francisco
90 Seventh Street, Suite 3-700
San Francisco, CA 94103
tel: (415) 625-7769 | fax: (415) 625-7772
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From: Connell, Erin M. [<mailto:econnell@orrick.com>]
Sent: Thursday, March 09, 2017 3:09 PM
To: Bremer, Laura - SOL
Cc: Pilotin, Marc A - SOL; Eliasoph, Ian - SOL; Miller, Jeremiah - SOL; Siniscalco, Gary R.; Kaddah, Jacqueline D.
Subject: RE: OFCCP v Oracle

Hi Laura,

Per my email below, once we have identified the appropriate deponents, we will be in touch regarding scheduling. In the meantime, our formal objections to the deposition notice, as well as an initial meet and confer letter regarding OFCCP's responses to Oracle's first set of interrogatories, are attached.

Thanks,

Erin

From: Bremer, Laura - SOL [<mailto:Bremer.Laura@dol.gov>]
Sent: Wednesday, March 08, 2017 3:13 PM
To: Connell, Erin M. <econnell@orrick.com>
Cc: Pilotin, Marc A - SOL <Pilotin.Marc.A@DOL.GOV>; Eliasoph, Ian - SOL <Eliasoph.Ian@dol.gov>; Miller, Jeremiah - SOL <Miller.Jeremiah@dol.gov>; Siniscalco, Gary R. <grsiniscalco@orrick.com>; Kaddah, Jacqueline D. <jkaddah@orrick.com>
Subject: RE: OFCCP v Oracle

Erin,

For the deposition(s), we are willing to move the dates to April 3-6 to accommodate your schedule. Please let us know which date(s) work, as well as whether you are interested in the alternative process outlined in my letter. Thank you.

Laura C. Bremer
Senior Trial Attorney
Office of the Solicitor
U.S. Department of Labor
90 7th Street, Suite 3-700
San Francisco, California 94103
(415) 625-7757

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From: Connell, Erin M. [mailto:econnell@orrick.com]
Sent: Wednesday, March 08, 2017 9:59 AM
To: Bremer, Laura - SOL
Cc: Pilotin, Marc A - SOL; Eliasoph, Ian - SOL; Miller, Jeremiah - SOL; Siniscalco, Gary R.; Kaddah, Jacqueline D.
Subject: OFCCP v Oracle

Hi Laura,

We are in receipt of your PMK deposition notice, as well as your cover letter proposing an alternative process. We are considering both and will provide a more substantive response shortly, but I do want to let you know that March 28 will not work as a proposed deposition date. Gary and I both are committed to attending and speaking at the ABA EEO Committee annual conference in New Orleans from March 27 – 31. Once we have identified the appropriate deponent(s) and coordinated calendars, we also will circle back regarding scheduling. In the meantime, if there are dates in April when you know you are not available, please let us know.

Thanks,

Erin

Erin M. Connell
Partner

Orrick

San Francisco <image001.jpg>
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M +1-415-305-8008
econnell@orrick.com

The logo for Orrick, featuring the word "orrick" in a lowercase, sans-serif font. Above the letter "i" is a circular graphic element consisting of a ring of dots.



Employment Blog

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Bremer, Laura - SOL

From: Connell, Erin M. <econnell@orrick.com>
Sent: Wednesday, March 15, 2017 1:50 PM
To: Pilotin, Marc A - SOL; Bremer, Laura - SOL
Cc: Riddell, J.R.; Herlinger, Logan J.; Kaddah, Jacqueline D.; Connell, Erin M.
Subject: OFCCP v Oracle - Edits to Production Stipulation
Attachments: 766600929(2)_Oracle - Stipulation re Production (Orrick Redline).DOCX;
766555804(2)_OFCCP v. Oracle Draft Protective Order.docx

Hi Marc,

To help facilitate today's meet and confer call, I am attaching our edits, in track changes, to the production stipulation. We also would like to begin discussions about a protective order, and have attached a proposed draft.

Thanks,

Erin

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Employment Blog

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CERTIFICATE OF SERVICE

I, Llewlyn Robinson, am a citizen of the United States of America and am over 18 years of age. I am not a party to the within action; my business address is 90 7TH Street, Suite 3-700, San Francisco, California 94103.

On May 5, 2017, I served the foregoing

OPPOSITION TO ORACLE'S MOTION FOR A PROTECTIVE ORDER RE:
CONFIDENTIAL INFORMATION

DECLARATION OF LAURA C. BREMER IN SUPPORT OF OFCCP'S OPPOSITION TO
ORACLE'S MOTION FOR A PROTECTIVE ORDER RE: CONFIDENTIAL INFORMATION

in this action by email, to:

Gary R. Siniscalco: grsiniscalco@orrick.com
Erin M. Connell: econnell@orrick.com
Jessica R.L. James: Jessica.james@orrick.com
Jacqueline Kaddah: jkaddah@orrick.com
Orrick Herrington & Sutcliffe LLP
405 Howard Street
San Francisco, CA 94105-2669

I certify under penalty of perjury that the above is true and correct.

Executed: May 5, 2017

/s/ Llewlyn D. Robinson
LLEWLYN D. ROBINSON
Paralegal Specialist

Office of the Solicitor
United States Department of Labor